

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GABRIEL G. ATAMIAN, M.D.,)	
M.S.E.E., J.D.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 00-797-SLR
)	
CAROL H. ELLIS, Director,)	
Division of Professional)	
Regulation; KENNETH H. BETHARD,)	
Investigator, Division of)	
Professional Regulation; M. JANE)	
BRADY, Attorney General of the)	
State of Delaware; MICHAEL J.)	
RICH, State Solicitor of the)	
State of Delaware,)	
)	
Defendants.)	

Gabriel G. Atamian, M.D., M.S.E.E., J.D., Dover, Delaware.
Plaintiff, pro se.

Lawrence W. Lewis and Stephani J. Ballard, Deputy Attorneys
General, Delaware Department of Justice, Wilmington, Delaware.
Counsel for Defendants.

MEMORANDUM OPINION

Dated: June 19, 2001
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Dr. Gabriel G. Atamian filed this action on August 30, 2000 alleging violations of his civil rights and common law conspiracy arising out of defendants' decision not to prosecute a complaint he filed with the Delaware Division of Professional Regulation ("the Division") against his dentist for unsatisfactory dental work. (D.I. 1) Currently before the court are defendants' motion to dismiss plaintiff's complaint (D.I. 9), and plaintiff's motion for supplemental pleading. (D.I. 15) For the following reasons, defendants' motion to dismiss is granted and plaintiff's motion for supplemental pleading is denied as moot.

II. BACKGROUND

On June 16, 1999, plaintiff filed a complaint with the Division ("the Complaint") against a licensed dentist, Dr. Arezoo A. Bahar.¹ On May 8, 2000, following an investigation by the Division, the Complaint was forwarded to the Delaware Department

¹The Division is responsible for the administrative and investigative functions of a large number of state professional and regulatory boards and commissions, including the Board of Dental Examiners. See 29 Del. C. § 8807(a). Among the duties of the Division is the investigation of complaints from citizens against professionals licensed by the boards and commissions it oversees. The Division may, after investigation, forward a complaint with a written report to the Delaware Department of Justice for review by a Deputy Attorney General for possible prosecution before the appropriate board. See 29 Del. C. § 8807(h). The Deputy Attorney General makes the final decision on whether to prosecute an allegation of unprofessional conduct against a professional licensee. See id.

of Justice for review pursuant to 29 Del. C. § 8807(h)(8). The Deputy Attorney General assigned to the Complaint elected not to prosecute the Complaint before the Board of Dental Examiners. Plaintiff was informed of this decision by letter dated July 18, 2000 from defendant Michael J. Rich, Delaware's State Solicitor.

In connection with the investigation and ultimate decision not to bring a professional prosecution against Dr. Bahar, plaintiff alleges violations of his constitutional rights under 42 U.S.C. § 1983 by all defendants. Plaintiff also alleges conspiracy to deprive him of constitutional rights in violation of 42 U.S.C. § 1985 and the common law by defendants Bethard and Ellis; failure to prevent conspiratorial action in violation of 42 U.S.C. § 1986 by defendants Brady and Rich; and violation of the Privacy Act of 1974, 5 U.S.C. § 552(a)(e)(5), by defendants Brady and Rich.

III. STANDARD OF REVIEW

In analyzing a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted

under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Where the plaintiff is a pro se litigant, the court has an obligation to construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 520-521 (1972); Gibbs v. Roman, 116 F.3d 83, 86 n.6 (3d Cir. 1997); Urrutia v. Harrisburg County Police Dep't., 91 F.3d 451, 456 (3d Cir. 1996). The moving party has the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

IV. DISCUSSION

A. Section 1983 Claims

Section 1983 imposes liability on any person who, under color of state law, deprives another of any rights secured by the Constitution or the laws of the United States. See 42 U.S.C. § 1983. To establish a Section 1983 violation, a plaintiff must "demonstrate a violation of a right protected by the Constitution . . . that was committed by a person acting under the color of state law." Nicini v. Morra, 212 F.3d 798, 806 (3d Cir. 2000). In his complaint, plaintiff alleges that defendants Ellis and Bethard "depriv[ed] plaintiff of his right to [the] equal protection and due process clauses as guaranteed by the

fourteenth amendment. . . ." (D.I. 1 at ¶ 23) He also claims that defendants Brady and Rich "depriv[ed] plaintiff . . . of due process, by denying plaintiff . . . a hearing [on the professional conduct of Dr. Bahar] before the Board of Dental Examiners." (Id. at ¶ 36)

As an initial matter, the Eleventh Amendment bars Section 1983 claims against state officials sued in their official capacities. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989). Therefore, plaintiff's Section 1983 claims against defendants in their official capacities are dismissed.

To the extent that plaintiff is suing defendants in their individual capacities, plaintiff fails to state an equal protection claim. A plaintiff who asserts an equal protection claim based on selective enforcement must show that: (1) the plaintiff, compared with others similarly situated, was selectively treated; and (2) the selective treatment was motivated by an intent to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person. See Brobson v. Borough of New Hope, No. 00-0003, 2000 WL 1738669, at *5 (E.D. Pa. Nov. 22, 2000). See also Gov't of the Virgin Islands v. Harrigan, 791 F.2d 34, 36 (3d Cir. 1986) (stating similar standard for equal protection claim based on selective criminal prosecution). In the present case, plaintiff fails to name any

other similarly situated person who was treated differently. He also does not allege an improper reason for defendants' decision not to prosecute Dr. Bahar. Plaintiff does not claim that he is a member of a constitutionally suspect class,² that defendants inhibited his constitutional rights,³ or that defendants bore a malicious intent to injure him. Thus, plaintiff's Section 1983 claims based on a violation of his equal protection rights are dismissed.

Similarly, plaintiff fails to state a violation of due process. Such a claim consists of three elements: (1) defendants must deprive plaintiff of an interest protected by law; (2) that deprivation must be the result of some governmental action; and (3) the deprivation must be without due process. See Cospito v.

²Plaintiff alleges that defendants have categorized him in the following "protected class":

Plaintiff has voluntarily chosen not to practice medicine since 1985, due to invidious discrimination animus of jewish physician which has rendered impossible for plaintiff to practice medicine. Accordingly, plaintiff has been taken by defendants, for an outcast or rebel, because of plaintiff's refusal to join health care providers.

(D.I. 1 at 8, n.6) Plaintiff also states that he was "born in the Middle East and has a distinguished accent . . . [and] has been taken for an 'Arab' by the jewish physician." (Id.) Plaintiff's status as a member of a "protected class" of non-practicing physicians is not a constitutionally suspect class under the equal protection clause. Plaintiff also fails to claim that defendants gave any consideration to his ethnicity in determining whether to prosecute Dr. Bahar.

³Because the Delaware Department of Justice has the discretion to bring professional prosecutions under 29 Del. C. § 8807, plaintiff has no constitutional right to the prosecution of Dr. Bahar. See due process discussion, infra.

Heckler, 742 F.2d 72, 80 (3d Cir. 1984). Because the prosecution of a licensed professional is within the discretion of the Delaware Department of Justice, plaintiff possesses no protected interest in maintaining a disciplinary action against Dr. Bahar. See 29 Del. C. § 8807(h); Wooters v. Jornlin, 477 F. Supp. 1140, 1144 (D. Del. 1979), aff'd, 622 F.2d 580 (3d Cir. 1980) ("[I]f one wishes to claim a right to a general governmental service, he must show that the provider of the service has a duty to provide that service. If the furnishing of the service is left to the discretion of the provider then there can be no entitlement."). Thus, plaintiff fails to allege a Section 1983 claim based on a violation of his right to due process.

B. Section 1985 Claims

To state a claim under 42 U.S.C. § 1985(3), a plaintiff must allege: (1) a conspiracy; (2) that the conspiracy is motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States. See Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997). In the case at bar, plaintiff fails to allege any racial or class animus by defendants that deprived him of equal protection or a

constitutional right. The court, therefore, dismisses plaintiff's Section 1985 claims.

C. Section 1986 Claims

Plaintiff also alleges that defendants Brady and Rich violated 42 U.S.C. § 1986 by failing to prevent the conspiracy between defendants Ellis and Bethard. Section 1986 provides:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent . . . the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured.

42 U.S.C. § 1986. Therefore, to adequately state a Section 1986 claim, a plaintiff must, inter alia, show the existence of a Section 1985 conspiracy. See Clark v. Clabaugh, 20 F.3d 1290, 1295 n.5 (3d Cir. 1994). As stated above, plaintiff has failed to state a claim for conspiracy under Section 1985. Thus, plaintiff's Section 1986 claims are also dismissed.

D. Section 552 Claims

Plaintiff alleges that defendants Brady and Rich violated 5 U.S.C. § 552a(e)(5) by "not investigating the [Division's] record . . . for its accuracy and completeness."⁴ (D.I. 1 at ¶ 35)

⁴Section 552a(e)(5) states:

Agency requirements. - Each agency that maintains a system of records shall -

. . .

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure

However, Section 552a(e)(5) is only applicable to federal agencies. See 5 U.S.C. § 551(1); Comm. Health Care Ass'n of New York v. DeParle, 69 F. Supp. 2d 463, 474 (S.D.N.Y. 1999).

Because all of the defendants in this case are state actors, plaintiff's Section 552 claims are dismissed.

E. Common Law Conspiracy Claims

Since all of plaintiff's federal claims are dismissed, the court declines to extend pendent jurisdiction over plaintiff's state law claims. The court, therefore, dismisses plaintiff's common law conspiracy claims.

V. CONCLUSION⁵

For the reasons stated, defendants' motion to dismiss is granted, and plaintiff's motion for supplemental pleading is denied as moot. An appropriate order shall issue.

fairness to the individual in the determination.

⁵Even if the court were to determine that plaintiff sufficiently stated a claim for relief, defendants are shielded from civil damages under the doctrine of qualified immunity. Plaintiff's constitutional right to the prosecution of a licensed professional was not "clearly established" at the time of the alleged violation, and a reasonable government official exercising his discretion not to prosecute Dr. Bahar would not have known that he was violating plaintiff's rights. See Rouse v. Plantier, 182 F.3d 192, 196-97 (3d Cir. 1999).

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RICH, State Solicitor of the)	
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)	
Defendants.)	

O R D E R

At Wilmington, this 19th day of June, 2001, consistent with
the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Defendants' motion to dismiss (D.I. 9) is granted.
2. Plaintiff's motion for supplemental pleading (D.I. 15)
is denied as moot.

United States District Judge